83-2125

Supreme Court, U.S.
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No. ....

In The

Supreme Court of the United States

October Term, 1983

LINDA S. McMAHON, As Director of the Department of Social Services of the State of California,

Petitioner,

v.

JANET VAESSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

The federal Social Security Act provides that in determining a family's need for assistance under the AFDC program, the State "shall . . . take into consideration any other income and resources" of the family. The question in this case is whether the State may treat federal and State income tax refunds as "income" of the family in the month the family receives the refund.

(Note: The issue in this case is inextricably tied to the issue currently pending before this Court in *Heckler v. Turner*, No. 83-1097, cert. granted February 27, 1984, which relates to the manner in which income tax withholdings are to be counted for AFDC purposes. See discussions, *infra*, pages 10-13.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this Petition for Certiorari, the following were parties to the action below:

Plaintiffs

KATHLEEN SENTIO
PAGET FUTRELL
JIMMY JONES
SHARON DELGADO
ALICIA HOWARD
ELOISE DORSEY
CAROL ESQUIBEL
WELFARE RECIPIENTS LEAGUE, INC.

(Plaintiffs sued on behalf of themselves and all others similarly situated, to wit, as a class action on behalf of all AFDC recipients who would be affected by treating income tax refunds as "income".)

Defendants

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES

(The Superior Court was named as a nominal party defendant in the mandate phase of the proceedings below)

MARION J. WOODS, as Director of the Department of Social Services

(At the time of the initiation of this case, Mr. Woods held the position now held by petitioner Linda S. McMahon.)

THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA

(The naming of the Department and the State as defendants was an unnecessary redundancy. The Director, who speaks for the Department and the State on this issue, was the only necessary defendant below.)

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No. ....

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JANET VAESSEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Attorney General of the State of California, on behalf of the Director of the Department of Social Services of the State of California, petitions for a writ of certiorari to review the decision of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court in question (App., *infra,* 1a-33a) is officially reported at 35 Cal.

3d 749. It is unofficially reported at 200 Cal.Rptr. 893 and 677 P.2d 1183.

The California Supreme Court decision resulted from a consolidated hearing combining two actions. The first was an appeal from a preliminary injunction granted by a Superior Court. The Superior Court injunction (App., *infra,* 34a-35a) is unreported. The California Court of Appeal decision (App., *infra,* 36a-42a) which unanimously reversed the Superior Court injunction is not officially reported. It is unofficially reported at 182 Cal. Rptr. 725. The second portion of the California Supreme Court decision is an original proceeding in the appellate court, and there is no lower court opinion.

JURISDICTION

The decision of the California Supreme Court was rendered April 5, 1984. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

STATUTES AND REGULATIONS

Since 1939 through the present time, section 402(a)(7) of the Social Security Act (42 USC § 602(a)(7)) has provided in relevant part:

A State plan for [AFDC] must

* * *

(7) . . . provide that the State agency—

(A) shall, in determining need, take into consideration any other income and resources of [the AFDC family].

In the Omnibus Budget Reconciliation Act of 1981 (OBRA) (P.L. 97-35, section 2304), Congress added section 402(a) (17) to the Social Security Act (42 USC § 602 (a) (17)) which adds the requirement that a "State plan for [AFDC] must"

(17) provide that if a person specified in paragraph (8) (A) (i) or (ii) receives in any month an amount of income which together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8) divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

In 1969 the predecessor of the U.S. Department of Health and Human Services (at 34 Fed. Reg. 1394-5) amended 45 CFR § 233.20 to read:

(a) *Requirements for State Plans.* A State Plan * * * must, as specified below:

* * *

(3)

* * *

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: * * *

(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered * * *.

In 1975, that portion of 45 CFR § 233.20 was amended (40 Fed. Reg. 12507), to read:

(a) *Requirements for State plans.*

* * *

(3)

* * *

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(a) in determining need, all remaining income and resources shall be considered in relation to the State's need standard:

45 CFR § 233.20 currently reads:

(a) *Requirements for State Plans.*

* * *

(3)

* * *

(ii)

* * *

(D) Net income, except as provided in paragraph (a) (3) (xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the

legal ability to make such sum available for support and maintenance. When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. . . .

STATEMENT OF THE CASE

This case involves the federal-State cash assistance welfare program operated pursuant to Subchapter IV, Part A, of the Social Security Act of 1935 (42 USC § 601 et seq.), known as Aid to Families with Dependent Children ("AFDC"). Congress has mandated that in operating the program, the State ". . . shall, in determining need, take into consideration any other income and resources" of the AFDC family. 42 USC § 602(a) (7).

The question in this case is whether federal and state income tax refunds received by the AFDC family can be counted as "income" within the meaning of 42 USC § 602 (a) (7).

The case started as a class action in Superior Court in Los Angeles County in 1979. In 1980, the Superior Court granted a preliminary injunction for the class enjoining the State from treating income tax refunds as "income". App., *infra,* 34a-35a. By its terms, the injunction applied only to tax refunds for the year 1979, which in normal course would be received in 1980.

The State appealed to the California Court of Appeal, the intermediate appellate court in California.

During the pendancy of the appeal, OBRA amendments took effect and the State again began to count income tax refunds as "income". Plaintiffs moved for an additional preliminary injunction in the Superior Court. The Superior Court denied the injunction. Plaintiffs filed an original proceeding in the appellate court, seeking a writ of mandate to compel the Superior Court to issue a preliminary injunction.

On May 20, 1982, the Court of Appeal unanimously overruled the Superior Court's preliminary injunction. App., *infra,* 36a-42a. At the same time, the Court of Appeal denied, without opinion, the request for a writ of mandate.

Thereafter, the California Supreme Court granted the plaintiffs' request for a hearing from the decision overruling the injunction and the denial of a writ of mandate to compel a further injunction.

The California Supreme Court then issued the opinion which is the subject of this petition, holding in a 4-3 decision that the State is prohibited by federal law from treating income tax refunds as "income", both prior to OBRA and after OBRA. App., *infra,* 1a-33a.

At all stages of the proceedings, in both the Superior Court action and in the related original appellate court action, the sole issue raised by the plaintiff class was whether income tax refunds can, consistent with federal law, be treated as "income". The California Supreme Court's decision is based on acceptance of those federal law arguments. Thus, the Court concluded

"For all the reasons set forth above, we conclude that defendant's regulation which considers income tax refunds as income to AFDC recipients in the month the refunds are received fails to comport with the language and purposes of the applicable federal statutes and regulations." App., *infra,* 22a.

REASONS FOR GRANTING THIS PETITION

1. This is an important issue which needs to be settled by this Court.

It can hardly be denied that the issue presented in this case is of significant nationwide importance. The AFDC program operates in all states, the District of Columbia and several Territories. There are over 1,500,000 AFDC recipients in California alone. According to plaintiffs' counsel, approximately 60 percent of those recipients will work at some time during the year and, presumably, have State and federal income taxes withheld from their wages. App., *infra,* 4a. Many will be entitled to receive, and will receive, all or a part of those withheld amounts as tax refunds the following year.

Whether those refunds can be treated by the State as "income" for purposes of computing an AFDC recipient's entitlement is, therefore, a question of nationwide significance that should be settled once-and-for-all by this Court. This is not an issue that should be resolved on a crazy-quilt pattern across the United States.

2. The California Supreme Court is wrong.

For the last 45 years, Congress has mandated that States "shall, in determining need, take into consideration any other income and resources" of the family. For a relatively miniscule portion of that 45 year period, to wit, 1969-1975, the controlling federal regulation provided that the States could consider "only such net income as is actually available for current use *on a regular basis.*" 45 CFR § 233.20(a) (3) (ii) (c); 34 Fed. Reg. 1394-5.

For that short period of time between 1969-1975, at least four courts considered the question of whether income tax refunds could be considered "income". The decisions reached conflicting results. Two courts concluded that income tax refunds were not received "on a regular basis" and, therefore, could not be treated as "income" under the controlling federal regulation. *Kaisa v. Chang* (D. Hawaii 1975) 396 F.Supp. 375; *Anderson v. Morris* (1976) 87 Wash. 2d 706 [558 P2d 155]. In fact, during that period, that was the California interpretation of the federal regulation. See *Alameda v. Carleson* (1971) 5 Cal.3d 730, 749 [488 P2d 953; 97 Cal. Rptr. 385]. Two other courts, however, reached a contrary result, holding that income tax refunds could be anticipated enough to be deemed "regular". *Steere v. State Dept. of Public Welfare* (1976) 308 Minn. 30 [243 N.W.2d 112]; *Walker v. Juras* (1974) 16 Ore. App. 295 [518 P2d 663].

In the present case, the California Supreme Court resolved the apparent conflict in the cases and stated

> "We agree with the Federal District Court for Hawaii and with the Supreme Court of Washington that income tax refunds cannot be considered regu-

larly received within the meaning of the laws governing AFDC." App., *infra,* 15a.

The flaw in that holding should be obvious. All the cases, including the two relied on by the California Supreme Court, were construing the term "on a regular basis" that was in the federal regulation during the period involved in those cases. The California Supreme Court ignores the fact that the "on a regular basis" language was expressly removed from the federal regulation in 1975. This case does not deal with years prior to 1975 when the "on a regular basis" language was in the regulation.

What is amazing about the California Supreme Court's decision to follow the State of Washington case is that the Washington decision, which was written after the 1975 regulation change, expressly noted the regulation change in footnote 1 of the decision and stated

> "We express no opinion as to the correct interpretation of this recent regulation or its application to a fact situation like that of the present case." (558 P2d, at 158)

Thus, to support its conclusion that income tax refunds received after 1975 cannot be considered "income" under the current federal regulation, the California Supreme Court relies upon a case which expressly states it is not ruling on that issue.

But what is even more amazing is that the California Supreme Court decision all but ignores the 1981 OBRA amendment which added the "lump-sum" rule to the Social Security Act. 42 USC § 602(a) (17). It must be conceded that the purpose of the "lump-sum" rule is to make sure that the receipt of a "lump-sum" payment is treated

as "income" in the month of receipt and budgeted for use in ensuing months. See OBRA Senate Finance Committee Report, 7A U.S. Congr. & Admin. News, September 1981, page 702; *Sweeney v. Murray* (First Cir.; April 27, 1984) — F.2d —. Yet, under the rationale of the California Supreme Court, the "lump-sum" rule would be virtually emasculated since "lump-sum" payments (such as inheritances, personal injury awards, etc.) are, by definition, not the type of payment which is received "on a regular basis." Thus, the California Supreme Court's holding (App., *infra,* 22a) that "irregularly received monies" cannot be considered "income" is directly contrary to the express intent of Congress and the express language of the current HHS regulation.

3. The State does not seek to "double count" income.

While the State is emphatic in its belief that income tax refunds are "income", the State is equally as emphatic in its belief that any particular dollar of "income" should not be "double counted". The system must be operated fairly—to both the taxpayers that fund the program and to the recipients who rely on the cash assistance to meet their needs. By counting all income once, that objective is met and the program will operate as outlined by Congress.

However, it is difficult to reach a conclusion regarding the treatment of income tax refunds until this Court decides *Heckler v. Turner,* No. 83-1097 (Cert. granted February 27, 1984), in which this Court has before it a question inextricably tied to the issue presented in this petition.

The question in this petition is whether income tax *refunds* can be considered "income" of the AFDC family. In *Turner,* the question is whether, in computing the "income" of AFDC families with wage earners, a deduction must be allowed for income tax *withholdings* at the time the income is earned. The fact that the two questions are related is undeniable. After all, the dollars that are *withheld* (and involved in *Turner*) are the very same dollars that are refunded at the end of the year (and involved in this case).

The plaintiffs in these two cases (who, incidentally, are represented in part by the same legal-aid office) are taking a "heads we win, tails you lose" position. They argue in *Turner* that the portion of the person's salary withheld for taxes cannot be treated as "income" when earned, and they argue in this case that those same dollars cannot be treated as "income" when received as a tax refund.

The State is not taking any such one-sided position. The State does not believe that any particular portion of a person's salary should be "double counted", i.e., counted as "income" in the grant computation process more than once. But the State just as strongly believes that to allow a portion of a person's salary to escape treatment as "income" altogether does violence to the Congressional mandate that the State "*shall,* in determining need, take into consideration any other income and resources" of the family. 42 USC § 602(a) (7).

If this Court should agree with the plaintiffs in *Turner* and hold in that case that the portion of the wage earner's salary withheld for taxes cannot be considered "in-

come" when earned, than it ineluctably follows, as night follows day, that those dollars should be considered "income" when they are actually received by the worker as a tax refund. We simply fail to understand how it could rationally be concluded that the portion of a person's "earned income" (i.e., salary) set aside to pay taxes but ultimately returned to the worker as a tax refund is not "income" at some stage in the process.

On the other hand, if this Court should conclude in *Turner* (as we think it should) that Congress has not provided a specific deduction from "earned income" for amounts withheld for taxes, then the proper treatment of tax refunds is less clear.

In the event this Court agrees with the government's position in *Turner,* it could logically be argued that since the worker's entire salary was treated as "earned income" when earned, a portion of that "earned income" should not be counted as "income" again if it is received in the form of a tax refund.

However, the issue is a bit more complicated. Even if the plaintiffs do not prevail in *Turner* and no special deduction for taxes is allowed, Congress has allowed a standard $75 per month deduction from "earned income." 42 USC §602(a) (8) (A) (ii). Thus, the "first $75" of the person's wages are excluded from countable "income." In all but a small fraction of cases, the $75 deduction will more than cover the worker's tax withholdings. Thus, it might logically be concluded that, by virtue of the $75 standard deduction, amounts withheld to pay taxes were not actually included in the net "income" that was used for grant computation purposes. In that event, it could be concluded that it would not be "double

counting" to treat the tax refund as "income" when received.

At this time, we express no opinion as to how tax refunds should be treated in the event that the plaintiffs do not prevail in *Turner*. Quite frankly, we believe that is precisely the type of administrative and programmatic issue that is best resolved by the U. S. Department of Health and Human Services through its broad rule making power. Accordingly, in the event of a ruling favorable to the government in *Turner,* we would first seek advice from HHS as to how income tax refunds should be treated.

CONCLUSION

The Court is requested to grant this petition for certiorari and then place the case on hold pending the Court's decision in *Heckler v. Turner,* No. 83-1097, or, alternatively, to not rule on this petition until after the Court has decided *Turner* and we have been afforded a chance to review our position in light of the *Turner* decision.

Dated: June 21, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP
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State of California

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Deputy Attorney General

Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 31617

Super. Ct. No. CA000563

JANET VAESSEN et al.,

Plaintiffs and Respondents,

v.

MARION J. WOODS, as Director, etc., et al.

Defendants and Appellants.

L.A. 31602

JANET VAESSEN, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

MARION J. WOODS, as Director, etc., et al.,

Real Parties in Interest.

Filed April 5, 1984

At issue is whether defendant California Department of Social Services' policy of treating income tax refunds as income for purposes of reducing the amount of assistance paid to recipients of Aid to Families with Dependent Children (AFDC) comports with applicable state and federal laws gov rning administration of the AFDC program. As we explain, we find the policy is inconsistent with the

provisions of the federal statutes and with the purposes of this program of public assistance. Under the controlling provisions such sporadically received monies can only reasonably be deemed resources which have no effect on the amount of a family's grant unless they combine with other existing resources to exceed the maximum allowed by statute.

The Director of the Department of Social Services (hereafter defendant) appeals from an order preliminarily enjoining the department from enforcing a regulation pertaining to payment of AFDC. (Vaessen v Woods, LA 31617.) Plaintiffs, representing affected AFDC recipients throughout California, petition for mandamus to compel a further injunction of a similar regulation which was subsequently promulgated. (Vaessen v. Superior Court, L.A. 31602). We ordered the cases consolidated in order to determine the validity of the policy embodied in both regulations. We affirm the judgment in L.A. 31617 and order issuance of the writ prayed for in L.A. 31602.

I

The named plaintiffs represent the class of California applicants for and recipients of AFDC whose benefits have been or will be reduced or denied due to their receipt of one or more income tax refunds for 1978 and subsequent tax years. They are recipients who have been employed long enough in a given year to accrue some withholdings, but who have not been long or profitably enough employed to attain self-sufficiency at a standard of living above the minimum standard of need defined by Welfare and Institutions Code section 11452.

Janet Vaessen's plight is typical of the difficulties created by defendant's policy of treating tax refunds as income. Ms. Vaessen is the sole support of her son. In the spring of 1979 she planned to study for the state nursing board examination. Passage of the examination would be a significant step enabling her to enter a work force where she could eventually become fully self-supporting. In April she received an income tax refund of $81.20. She duly reported the receipt to her eligibility worker. She then spent the refund money to pay overdue bills, to purchase clothing and for transportation. Nevertheless, two months later her AFDC grant was reduced by the full $81.20, to a total sum of $206.[1] As a result, Ms. Vaessen had to borrow money simply to pay the family's rent of $225, and was without funds with which to pay for utilities, transportation, laundry and other essential items. Instead of studying, she had to look for some kind of work that would enable her to meet the family's immediate survival needs.

Plaintiff-in-intervention Carol Esquibel supports her two young children. Her August 1979 grant was reduced to $73 as a result of the receipt in June of $381 in state and federal tax refunds. By August, however, the tax refunds had long since been spent on automobile repairs and the purchase of shoes and clothing for the children. As a result Ms. Esquibel could not pay her rent. Her family

[1]Under the system of "prior month budgeting" used by California throughout the period of this lawsuit, the amount of an AFDC payment is based upon an assessment of the need, income and resources of the recipient household in a "budget month" which is the second month prior to the "payment month." (See, State Dept. Social Services, Eligibility and Assistance Standards Manual (hereafter EAS), 44-315.61.)

suffered the extreme hardship and disruption of court proceedings which resulted in the family being scheduled for eviction by the sheriff at the end of August.

The other plaintiffs, named and unnamed, suffered similar hardships as they tried to eke out an existence even though the meager assistance provided to them was reduced or denied altogether because of the earlier receipt of tax refunds. Pursuant to Welfare and Institutions Code sections 11450 and 11452, California provides grants to needy families according to the size of the household. Currently, a family of two receives enough aid to bring its total monthly income to \$408; a family of three is allotted \$506, a family of four \$601 and a family of ten or more may receive \$1,071. As this court noted in County of Alameda v. Carleson (1971) 5 Cal. 3d 730, these standards are "*minimum* basic standards of adequate care" and "not necessarily reflective of actual need." (*Id.,* at p. 742, fn. 14; see also Welf. & Inst. Code § 11452; California Welfare Rights Organization v. Carleson (1971) 4 Cal.3d 445, 448-452). Thus, it is neither a surprise nor an indication of careless spending to find that recipient families must often utilize their tax refunds to meet current pressing needs and are unable to "save" the funds to meet the expenses of daily living two months later. The record shows that the department estimated that in the fiscal year 1976-1977 approximately 22,700 California AFDC recipients would receive federal income tax refunds and that the average amount would be approximately \$131 per recipient. At oral argument plaintiffs explained that the number of families receiving tax refunds represents less than 5 percent of the total number of AFDC recipients, even though 60 percent of recipients work at some time during the year.

The original plaintiffs filed a complaint seeking mandamus (Code Civ. Proc., § 1085), declaratory and injunctive relief, and retroactive payment of AFDC benefits withheld pursuant to the department's policy of treating income tax refunds as income rather than as property resources. Defendants are the director, the department and the State of California. Plaintiffs claim that the department's policy violates the purposes of the AFDC program, the language of federal regulations—since deleted—which defined income as funds "actually available for current use on a regular basis" (45 C.F.R. § 233.90, (a)(1) as promulgated in 1975), and this court's holding in County of Alameda v. Carleson (1971) 5 Cal.3d 730, appeal dismissed (1972) 406 U.S. 913.

On July 27, 1979, the Los Angeles Superior Court granted a preliminary injunction restraining defendants from denying AFDC benefits to the named plaintiffs pursuant to their policy regarding tax refunds. The parties later stipulated to an additional injunction covering the plaintiffs in intervention. On April 14, 1980, after the class had been certified, the court issued an injunction restraining defendants from reducing or denying benefits of all recepients of and applicants for AFDC in California on this basis. The order was made effective immediately, compelling payment of full benefits in the month of April 1980. Defendants appealed. (Code Civ. Proc., § 904.1, subd. (f).) Pending the appeal, however, they agreed to abide by the injunction and treat refunds from the 1980 tax year as resources when they were received in 1981. (Vaessen v. Woods, L.A. 31617.)

In response to the federal Omnibus Budget Reconciliation Act of 1981 (Pub. L. No. 97-35, hereafter the OBRA)

the department promulgated new regulations which classify, inter alia, monies withheld from recipients' paychecks for state and federal income tax purposes, as income actually available upon receipt of the paychecks and require corresponding reductions in grant payments. At the same time the department announced its intention to resume treating income tax refunds as income in the month received. Under these regulations excess withholdings would be considered as income to recipients twice: once when withheld and a second time when returned.

On April 23, 1982, plaintiff's sought another preliminary injunction ordering the department to release any benefits for April 1982 withheld as a result of its policy regarding refunds from the 1981 tax year. The Los Angeles Superior Court granted a temporary restraining order. After further briefing and argument, however, the court denied a preliminary injunction and dissolved the restraining order. Plaintiffs then sought a writ of mandate. (Vaessen v. Superior Court, L.A. 31602.)

The Court of Appeal summarily denied mandamus. On the same day it issued its published opinion reversing the original preliminary injunction. Pending final determination of L.A. 31602 we ordered the department to treat as resources instead of as income, all income tax refunds received at any time during which real parties in interest (defendants) were including income tax withholdings as income for AFDC purposes, and all refunds attributable to income tax withholdings that were included in income in determining the allowance or amount of AFDC benefits.

The practice of "double counting" was suspended by a decision of the United States District Court for the Northern District of California permanently enjoining the

department from considering monies withheld for income tax purposes as income available to AFDC recipients. (Turner v. Woods (N.D. Cal. 1982) 559 F.Supp. 603 aff'd. (9th Cir. 1983) 707 F.2d 1109, cert. granted Feb. 27 1984 *sub nom.* Heckler v. Turner — U.S. — [52 U.S. L.Week 3631].) Its validity is therefore not now considered.

II

AFDC was established by the Social Security Act of 1935. (42 U.S.C. § 601 et seq.) It is jointly funded by the federal government and the states and is administered by the states in a scheme of "cooperative federalism." (King v. Smith (1967) 392 U.S. 309, 316.) While state participation is elective, federal funding is conditioned on program compliance with the Social Security Act (Act) and applicable federal regulations. (See, 45 C.F.R. § 233.10 et seq.) California participates under the terms of Welfare and Institutions Code section 11200 et seq.

One of four categorical assistance programs established by the Act, AFDC provides financial assistance to families in which a dependent child is in need of financial support because of the absence, disability or unemployment of a parent. (See, 42 U.S.C. §§ 606(a), 607, 608; Welf. & Inst. Code, §§ 11250, 11251.)

Two major purposes of the program are recognized. From the outset AFDC has sought to provide for the financial needs of families with dependent children so that the children may remain in their home. (See, Burns v. Alcala (1975) 420 U.S. 575, 581; King v. Smith, *supra,* 392 U.S. 309.) In conjunction with subsequent amendments which made families with an unemployed parent eligible for AFDC assistance (this criterion was established in

1961 and became a permanent feature of the program in 1967, see, 1981 U.S. Code Cong. & Admin. News, p. 781), a purpose of encouraging caretaker relatives to achieve self-support through employment has also been emphasized. (See Shea v. Vialpando (1974) 416 U.S. 251, 253.)

The states have broad discretion to determine the minimum standards needed to maintain family life and to devise systems for determining financial eligibility and the amounts of assistance they will pay. (Shea v. Vialpando, *supra,* 416 U.S. 251, 253; King v. Smith, *supra,* 392 U.S. 309, 318.) Other eligibility criteria, e.g., the definition of an absent parent or the class of eligibile children, must be measured by federal standards. (Carleson v. Remillard (1972) 406 U.S. 598; Townsend v. Swank (1971) 404 U.S. 282.)

California has adopted a "flat grant" system in which the amount of payments made to eligible families is determined according to the number of eligible needy persons in the household. The monthly payment equals the maximum aid for the appropriate size family, less all non-exempt income of members of the household. (See Welf. & Inst. Code, § 11450; Conover v. Hall (1974) 11 Cal.3d 842.) Because California uses a "prior month budgeting" system, a recipient's monthly grant is calculated according to his or her assessed need and reported income in the "budget month"—the second month preceding the "payment month." (See, EAS, § 44-315.61.)[2]

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[2]The OBRA requires all states to use retrospective budgeting for purposes of calculating the amount of assistance payments after the initial one or two months of eligibility. (42 U.S.C. § 602(a)(13); 45 C.F.R. § 233.31 et seq.)

In determining a family's need for financial assistance, the federal statute requires the states to consider income and resources other than AFDC payments which are available to the needy child or relative claiming aid. (42 U.S.C. § 602(a)(7).) Where "earned income" is considered, the Act requires that certain work-related expenses be disregarded (42 U.S.C. § 602(a)(8)) so that recipients are not penalized financially when they become partially self-supporting through employment. The Act further requires states to disregard specified portions of the remaining earned income in order to provide a reward and an incentive for recipients to work. (42 U.S.C. § 602(a)(8).)

In addition to the amounts which the states are required to disregard from earned income, the states may permit applicants and recipients to "reserve" specified amounts and types of property, including cash, while receiving assistance. (42 U.S.C. § 602(a) (7)(B); 45 C.F.R. § 233.20(a)(3)(B).) Reserves or "resources" consist of property, already in possession of the recipient or that which is accumulated by saving earned income or assistance payments. (See C.F.R. § 233.20(a) (6) (viii).[3] The essential difference between items characterized as income and those considered "resources" is that any nonexempt income is deducted from the standard of need when determining eligibility and the amount of assistance payments,

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[3]Current federal law allows a family to retain resources with a combined equity value of less than $1,000, plus the home it owns and occupies, plus an automobile with equity value of less than $1,500, plus essential household and personal goods. A state may specify lower limits on resources. (42 U.S.C. § 602 (a)(7)(B); 45 C.F.R. § 233.20(a)(3)(i)(B).) California permits recipients to retain the maximum resources permitted by federal law. (Welf. & Inst. Code, §§ 11155,11257.)

while resources may be retained without affecting the amount of the assistance provided. If a family's resources exceed the maximum amount permitted, the family is ineligible for assistance altogether. (42 U.S.C., § 602(a)(7); 45 C.F.R. § 233.20(a)(i)-(ii); see Welf. & Inst. Code, §§ 11155, 11257.)

III

In spite of the apparent importance of the distinction between income and resources to recipients and to program administrators, neither Congress nor the California Legislature has deemed it appropriate to define the terms. Defendant claims that this void confers upon state administrators broad discretion to determine whether items such as tax refunds will be characterized as income or as resources. Defendant acknowledges that the department's policy prior to 1971 was to consider refunds as resources (see County of Alameda v. Carleson (1971) 5 Cal.3d 730). But defendant argues that the decision to change that policy was one within the discretion vested in the department to administer the program and promulgate regulations "not in conflict with the law." (See Welf. & Inst. Code, §§ 10600, 10604.) Moreover, defendant asserts that under the terms of the OBRA of 1981, federal law now requires that tax refunds be treated as lump sum income. (See 42 U.S.C. § 602(a)(17).) We disagree.

Rather, we find persuasive plaintiffs' argument that treating tax refunds as resources is the policy which most reasonably comports with the terms and purposes of the federal statute and regulations. Those provisions indicate that only monies which are regularly and actually available to meet the current needs of AFDC recipients may be

considered income to recipient families. Treating tax refunds as resources has the additional salutary effects of providing an incentive for employment and promoting administrative efficiency. We find that defendant's regulation is incompatible with these basic purposes of the program and is therefore void. (See, Cooper v. Swoap (1974) 11 Cal.3d 856; California Welfare Rights Organziation v. Carleson (1971) 4 Cal.3d 445, 458.)

The Act authorizes appropriations for AFDC "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . . to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." (42 U.S.C. § 601.) Providing economic security requires a steady source of income from which to meet the recipient's recurring basic needs. Thus, monthly payments must be provided with reasonable promptness to all individuals who meet eligibility requirements. (42 U.S.C. § 602(a)(10.) Termination of these benefits must be preceded by adequate notice and an opportunity for the recipient to challenge the proposed action. (Goldberg v. Kelly (1970) 397 U.S. 254.)

In determining need "there is no question that regular and actual contributions to a needy child . . . can be taken into account. . . ." (King v. Smith, *supra*, 392 U.S. 309, 319. The United States Supreme Court has said that federal administrative regulations which restrict resources to be taken into account to those " 'that are, in fact available to an applicant or recipient for current use on a regu-

lar basis. . . .'" clearly comport with the statute. (*Id.*, at p. 319, fn. 16; Lewis v. Martin (1969) 397 U.S. 552, 555.)

The courts have uniformly and repeatedly protected recipients from false assumptions that money the states believe should be available to meet living expenses is in fact actually available for such use. (King v. Smith, *supra,* 392 U.S. 309 [state regulation denying benefits to children of woman cohabiting with a man regardless of whether he was obligated to or did in fact contribute to their support invalid]; Lewis v. Martin (1970) 397 U.S. 55 [upholding Department of Health, Education and Welfare regulation providing that income from nonadoptive stepfather or other person without legal obligation of support may not be presumed available]; Van Lare v. Hurley (1974) 421 U.S. 338 [state statute denying benefits to children of woman permitting lodger to stay with family regardless of whether he actually contributed to their support invalid]; North Coast Coalition v. Woods (1980) 110 Cal.App.3d 800 [regulation assuming contribution of unmarried adult male reduced needs of household by set amount invalid].)

Cases which have specifically addressed the problem of classifying income tax refunds as income or resources have relied on a federal regulation which limited monies that could be deemed income to "only such net income as is actually available for current use on a regular basis . . . ." (45 C.F.R. 233.20(a)(93)(ii)(c) (1973); 45 C.F.R. 233.90 (1979).) In Kaisa v. Chang (D. Hawaii 1975) 396 F.Supp. 375, a federal district court decided that the language "on a regular basis" had a meaning distinct from the requirement that income be "actually available." "Given the uncertainty of receiving any tax refund and the fact that

even if received, it can be expected, at most, once annually, . . ." the court found such refunds could not be deemed available on a regular basis and hence were not income for AFDC purposes. (396 F.Supp. at pp. 377-378.) In Anderson v. Morris (1976) 87 Wn.2d 706 [588 P.2d 155], the Washington State Supreme Court also found that "a tax refund is not 'regular' in the ordinary sense of the word" and hence was not to be considered income. (588 P.2d at p. 158.)[4]

In County of Alameda v. Carleson, *supra,* 5 Cal.3d 730, app. dism. (1972) 406 U.S. 913 we held that the department's policy of excluding involuntary payroll deductions from income was proper since "only *net* income available for current use on a regular basis should be considered. . . . (45 C.F.R. § 233.20(a)(3)(ii)(D)." We further approved the department's then applicable policy of treating such monies as resources when refunded, finding the distinction between recurring and nonrecurring lump-sum payments consistent with the "regular basis" language of the federal regulations. (5 Cal.3d at p. 749.)

Current administrative regulations recognize that a steady and dependable level of income is crucial to providing adequate care of children which is the paramount goal of AFDC. For instance, the regulations provide that

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[4]Even the cases finding refunds to be income have relied on this regulatory language. Both Steere v. State Dept. of Public Welfare (1976) 308 Minn. 30 [243 N.W.2d 112] and Walker v. Juras (1974) 16 Ore.App.295 [518 P.2d 663] hold that tax refunds are a reasonably predictable annual source of income which may be deemed to be available on a regular basis. Both cases note that refunds may be distinguished from other kinds of lump-sum payments, such as inheritances, gifts, insurance benefits, in that the refunds are attributable to the efforts of the recipient.

"net income available for current use and currently available resources shall be considered . . ." in determining levels of assistance. (45 C.F.R. § 233.20(a)(3)(ii)(D).) The regulations permit the states to prorate income which is received in a lump sum pursuant to an employment contract, or which is received intermittently (e.g., quarterly or annually) over the period which the income covers. (45 C.F.R. 233.20(a)(3)(iii).) The statutory and regulatory provisions which permit an agency to "recoup" excess assistance payments underscore a congressional awareness of the fundamental importance of a consistently and currently available level of financial resources. Where an agency seeks to recover money by reducing the grant to an individual who is a current recipient of aid, the reduction may not leave the recipient's family with liquid resources and income which are less than 90 percent of the amount the agency customarily pays to a family of like size and composition. (42 U.S.C. § 602(a)(22); 45 C.F.R. § 233.20(a)(13)(A)(2).)

With regard to public assistance rendered under the federal food stamp program, Congress has enacted legislation specifying that income tax refunds are to be treated as resources. Subdivision (d) of section 2014 of title 7 of the United States Code excludes 12 types of payments from the computation of household income. Among the excluded items are "moneys received in the form of nonrecurring lump-sum payments, including but not limited to, income tax refunds, rebates, or credits. . . . *Provided*, that such payments shall be counted as resources, unless specifically excluded by other laws, . . ." (7 U.S.C. § 2014 (d)(8).)

The report of the House Committee on Agriculture which recommended adoption of subdivision (d) as part

of the Food and Agriculture Act of 1977 (Pub. L. No. 95-113) is instructive of the policy considerations underlying this congressional decision. "Counting these payments as income rather than as assets would create serious administrative problems. Food stamp offices would have to recompute the eligibility and benefit levels of tens of thousands of households in the month that tax refunds arrive, then return eligibility and benefits to their original level the following month. Then this whole cumbersome procedure would have to be repeated all over again if a state tax refund arrived in a different month from the Federal tax refund. [¶] All of this paperwork makes especially little sense since the amounts of money involved in tax refunds that food stamp recipients might get, or in such things as birthday presents, are small." (House Rep., No. 95-464, reprinted in 1977 U.S. Code Cong. & Admin. News, p. 2014.)

We agree with the Federal District Court for Hawaii and with the Supreme Court of Washington that income tax refunds cannot be considered regularly received within the meaning of the laws governing AFDC. (Kaisa v. Chang, *supra,* 396 Fed. Supp. 375; Anderson v. Morris, *supra,* 558 P.2d 155.) Refunds are made and received but once each year. Only the small number of recipients whose withholdings exceed their tax liability may receive refunds. Further, as plaintiffs assert, refunds are rarely a recurring source of funds for AFDC recipients because so few receive them in any given year and because the average duration of a family's receipt of AFDC is only approximately two years. Thus, these funds are not consistently available to meet continuing needs.

The fact that specific regulatory language relied on in prior cases does not appear in the 1982 version of the

regulations implementing AFDC does not change the import of the overall scheme enacted by the legislative body. The scheme clearly seeks to insure that needy children will be provided with a minimally adequate level of care and support. This purpose can only be achieved if items classified as income, which directly reduce an AFDC grant, are limited to those which are received on a sufficiently regular basis that they may be depended upon to meet the recipients' continuing basic needs.

We note that it is the nature of tax refunds when they are *received*, rather than the nature of the monies from which they have been derived which is relevant to a recipient's ability to meet his or her daily needs. To the recipient, the lump sum payment that arrives in the spring might be said to resemble a savings account which the government has forced him or her to establish. The sum refunded is like a reserve which has been accumulated from earnings. According to federal regulations, such reserves should be treated like any other resource. (See 45 C.F.R. § 233.20(a) (6) (viii).)

Contrary to defendant's assertion, treating tax refunds as resources rather than income will not result in unwarranted windfalls allowing persons with substantial financial resources to remain on the public welfare rolls. The amounts of money involved are relatively small; as noted, defendant's own estimate was that the average refund received by an AFDC recipient for the year 1976 would amount to merely $130.[5] Both state and federal

[5]While this amount is inconsequential when considered in relation to the amount required to sustain a needy family over any significant period of time, it is large indeed when deducted from a single month's assistance grant.

statutes render a family ineligible for public assistance if the value of its resources exceeds $1,000. (42 U.S.C. § 602 (a)(7); Welf. & Inst. Code, § 11257.)

The department defends the regulation in effect in 1979 on the theory that under the then current federal law it was free to designate tax refunds as either income or resources to AFDC recipients.[6] The department claims that neither this court's opinion in County of Alameda v. Carleson, *supra,* 5 Cal.3d 730, nor the "regular basis" language then included in the federal regulations controlled its administrative decision.

In *Carelson,* (sic) *supra,* this court was presented with a suit by several California counties seeking to force the Director of the Department of Social Welfare (now the Department of Social Services) to adopt policies pertaining to the disregard of earned income and the deduction of work-related expenses which would be less generous to welfare recipients. At the time the department permitted the exclusion from income of involuntary deductions such as income tax withholdings, while considering tax refunds as resources when they were received. The policy was based on the distinction of nonrecurring lump sum payments, considered property or resources, from recurring ones, considered income. (Former EAS § 41.309; see

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[6]In support defendant urges us to accept the 1980 declaration of the assistant regional commissioner of the Social Security Administration as a contemporaneous administrative interpretation of the law which is entitled to great deference. We note, however, that there is no indication that this interpretation is contemporaneous with the statutory provision it purports to interpret. Neither has the Department of Health and Human Services (formerly Health, Education and Welfare) chosen to address the treatment of tax refunds officially by promulgating published regulations.

Welf. & Inst. Code, § 11157.) This court approved the department's policy, finding both exclusions from income comported fully with the federal requirement that only net income available for current use on a regular basis could be considered. (5 Cal.3d 730, 749.)

In order to uphold the department's policy of treating tax refunds as resources, the *Carleson* court needed only to find the regulation was consistent with federal law. The court was not required to squarely hold that federal law *required* that treatment. Nevertheless, prior decisions of this court indicate the department bears the burden of showing that its abrupt reversal of policy in the wake of explicit judicial approval[7] executed an expressed legislative intent and resulted in a policy consistent with federal law. The department has shown neither. In Cooper v. Swoap (1974) 11 Cal.3d 856, this court invalidated a regulation by which the department deemed savings occasioned by shared housing to be income for AFDC purposes. The court observed that the regulation represented a "radical departure" from prior practice. Had the Legislature intended such a change, it surely would have clearly expressed that intent in the provisions of the Welfare Reform Act of 1971. "Otherwise we must conclude that the Legislature, familiar with the long-standing administrative interpretation of income, manifested its approval by leaving the income provision of section 11008 unchanged." (11 Cal.3d at p. 868.) In California Welfare Rights Organization v. Carleson, *supra,* 4 Cal.3d 445, this court held invalid a departmental attempt to effect a fundamental change in the method of calculating the level of AFDC

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[7]The new policy was apparently instituted just after the *Carleson* decision was reached.

benefits where the Legislature had not clearly expressed an intent to make the change. (4 Cal.3d at p. 458.) Under the analysis of these cases it falls to the department to demonstrate either a legislative intent to change the treatment of income tax refunds or that such a change is required by federal law and does not contravene controlling California statutes.

The department, however, offers little by the way of reasons for the 1971 change in policy. It argues that income tax refunds are regularly received by employed recipients on an annual basis. We have already indicated that we do not believe this is the kind of regularity of income contemplated by the AFDC statutes. The department then argues that regularity of receipt is not required by the particular regulation relied on by plaintiffs (45 C.F.R. § 233.90 (1979) because that regulation concerned the attribution of income from a substitute father, or unmarried man living in an AFDC household. This, however, is beside the point. The regulation cited in *Carleson* (45 C.F.R. § 233.20(a)(3)(ii)(c)) clearly did pertain to the computation of income generally. The department complains that the *Carleson* court merely assumed, erroneously, that income tax refunds were akin to nonrecurring lump sum social insurance payments which the California Legislature has designated as resources rather than income pursuant to Welfare and Institutions Code section 11157. The *Carleson* court did not, however, rely on section 11157; rather it upheld then existing departmental regulation EAS section 41-309 on the basis of its consistency with controlling federal law.

Section 11157 of the Welfare and Institutions Code does not define either income or lump sum income. It

merely provides that income which happens to be received in a lump will be considered income in the month received. The statute excludes "nonrecurring lump-sum social insurance payments, which . . . shall include but are not limited to social security income railroad retirement benefits, veteran's benefits, workman's compensation, and disability insurance." Paragraph two of the statute further provides that to the extent required by federal law "lump-sum payments of income, as defined by federal law, shall be considered income in the month received. . . ."

This provision of our state statute is similar in effect to the lump-sum income provision added to the federal Act by the Omnibus Budget Reconciliation Act of 1981. Defendant claims this new federal statute requires the department to consider income tax refunds as income to AFDC recipients and hence supports repromulgation of a departmental regulation to that effect.

Subdivision (a)(17) of 42 U.S.C. section 602 provides that "if a person . . . receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need . . ." the income will render the family ineligible for assistance for the "whole number of months that equals (i) the sum of such amount and all other income received in such month . . ., divided by (ii) the standard of need applicable to such family . . . ."

The section does not purport to define "income." In fact, the report of the Senate Budget Committee states that the amended section will have the effect of counting "any payments that meet the definition of income—for example, retroactive social security benefits—" as income in the month of receipt and thereafter until the payments

have been exhausted according to the established standard of need. (Sen. Rep. No. 97-139, reprinted in 1981 U.S. Code Cong. & Admin. News, at p. 771.) Thus it seems that the section was intended to apply to payments of money that would ordinarily be received in the form of regular, recurring income—such as social security benefits—but which for some reason—such as the delay inherent in processing initial claims—is received in a lump. Income tax refunds do not fit into this category. Defendant's argument that the OBRA requires him to consider tax refunds as lump sum income is not supported by the statute upon which he relies.

We believe that treating such occasional monies as tax refunds as resources rather than income is consistent with another expressed legislative concern: that the AFDC program be administered in the most efficient and effective manner possible. As noted above in relation to the food stamp program, the tax refunds of persons eligible for AFDC are generally quite modest. Thus, the paperwork required to adjust monthly grants of every family receiving a tax refund either two or four times per year (depending on whether state and federal refunds arrive in the same month) is likely to be disproportionate to the fiscal savings the program may expect to realize. At the same time, as the plaintiffs here demonstrate, the hardship worked on individual families is considerable.[8]

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[8]One further argument is implicit in defendant's position: that *all* monies received by AFDC recipients in a given month should be considered income for AFDC purposes. However, defendant's own regulations show that this cannot be the basis for the treatment of income tax refunds. EAS section 44-111.44 excludes from consideration as income the first $60 each quar-

(Continued on following page)

For all the reasons set forth above, we conclude that defendant's regulation which considers income tax refunds as income to AFDC recipients in the month the refunds are received fails to comport with the language and purposes of the applicable federal statutes and regulations. We hold that an appropriate regulation is one which considers irregularly received monies like tax refunds to be resources to the recipient household. We believe that not only does this holding further the fundamental statutory purpose of providing economic stability and security to families with dependent children who are in need of and eligible for governmental assistance, but in the long run it also will further the legislative desire that California's public assistance system function in the most efficient and effective manner.

The order of the Los Angeles Superior Court granting preliminary injunctive relief in Vaessen v. Woods is affirmed. Let writ of mandate issue compelling the court to enter a further injunction as prayed by plaintiffs and petitioners in Vaessen v. Superior Court. The matter is re-

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ter of the year which is received infrequently or irregularly. EAS section 44-101.4 gives as examples of such income: "Income from occasional labor . . . which offer no security as a regular source of maintenance; . . . the value of the usual small gifts in cash or in kind given in commemoration of holidays and anniversaries; . . . interest on securities which has no appreciable significance in meeting continuing needs. . . ." Defendant offers no reason why tax refunds—if they were income—should be treated differently from other irregularly received monies.

manded for further proceedings consistent with the views we have expressed.

REYNOSO, J.

WE CONCUR:
BIRD, C.J.
MOSK, J.
BROUSSARD, J.

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent.

Our function is to assure that the policy adopted by the California Department of Social Services (DSS) is "not in conflict with the law" as contained in the applicable statutes and regulations. (Welf. & Inst. Code, §§ 10600, 10604; compare Allen v. Bergland (4th Cir. 1981) 661 F.2d 1001, 1005 ["the relevant inquiry is whether the department's interpretation is *inconsistent* with the regulations and not whether some other interpretation is consistent with those same regulations"].) I conclude that the state's treatment of income tax refunds is in compliance with federal requirements. The necessary analysis should begin with an acknowledgement that 42 United States Code section 602(a)(8) requires that the states "take into consideration any other income or resources of any child or relative claiming aid to families with dependent children" except as otherwise specifically required.

Two years ago, Congress enacted the Omnibus Budget Reconciliation Act of 1981 (OBRA). The federal regulations promulgated pursuant to OBRA are relevant to the issue before us. They require that in determining finan-

cial eligibility for, and the amount of, assistance payments "Net income available for current use and currently available resources shall be considered: income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." (45 C.F.R. § 233.20 (a)(3)(ii)(D).) "Earned income" includes "income in cash or in kind earned by a needy individual through the receipt of wages, salary, [and] commissions . . . ." (*Id.*, (a)(6)(iii).) Such "earned income" is comprised of the total amount of wages, salary, and commissions "irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work . . . ." (*Id.*, (a)(6)(iv).)

The federal regulations further provide for specific "disregards" of income for work related expenses, child care and a percentage of the earned income. Although no provision specifically permits disregarding income tax deductions at the time they are withheld, there is authority that "the Congressional purposes underlying the AFDC statutes indicate that the Social Security Act requires subtraction from gross income of mandatory payroll deductions ***in addition to*** subtraction of $75.00 per month 'work expenses' disregard." (Italics in original, Turner v. Woods (N.D.Cal. 1982) 559 F.Supp. 603, 615, affd. (9th Cir. 1983) 707 F.2d 1109, cert. granted *sub nom.* Feb. 27, 1984, Heckler v. Turner — U.S. — [52 U.S. L.Week 3624].) In so deciding, the district court relied upon a long line of cases holding that Congress intended to encourage work and that this purpose was best served by "limiting the amount of 'income' counted against a recipient to funds that are *actually and currently available.*" (Italics added,

ibid.) Because amounts withheld for taxes are not so available, they may not be considered as income. However, when such withheld amounts are returned to the taxpayer in the form of refunds, their status changes and they become "available" and must be treated as income.

Previous federal regulations required state plans to provide that "In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use *on a regular basis* will be considered . . . ." (Italics added, former 45 C.F.R. § 233.90(a)(1).) The foregoing language requiring receipt "on a regular basis" has been expressly deleted from the regulations. In my view, this deletion has interpretive significance. Nonetheless, my colleagues continue to rely on cases which construed the earlier, now inapplicable requirement. In County of Alameda v. Carleson (1971) 5 Cal.3d 730, 749, Kaisa v. Chang (D. Hawaii (1975) 396 F.Supp. 375, 377, and Anderson v. Morris (Wash. 1976) 558 P.2d 155, 158-159, each court relied upon the "regular basis" terminology in concluding that tax refunds could not be considered as income under the then applicable regulations. For example, the *Kaisa* court reviewed the argument that in considering eligibility and the amount of assistance payments due, "income must meet all three requirements: (1) actually available; (2) for current use; and (3) on a regular basis." The court concluded that "Since a tax refund can be expected, at best, once a year, it is not available on a regular basis and, *therefore*, cannot be considered as income." (Italics added, 396 F.Supp. at p. 377, fn. omitted.)

The deletion of the requirement that income be available "on a regular basis" appears related to the broader

change effected by Congress through OBRA in the treatment of lump-sum payments in general. Formerly, such payments were considered as income in the month received and as resources thereafter. The practical effect of this treatment was that once a sum was regarded as a resource, to the extent that it did not exceed applicable limits on the amount of resources, it was ignored in computing either eligibility or the amount of a grant.

The current version of section 602(a)(17)(A) of title 42 of the United States Code provides that if a recipient in a particular month receives income which exceeds the applicable standard of need, the family will be ineligible "for the whole number of months that equals (i) the sum of such amount and all other income received in such month, . . . divided by (ii) the standard of need applicable to such family . . . ." Any balance of such income which is less than the applicable monthly standard is treated as income received in the following month. This is significant fiscal tightening.

Income tax refunds are employment-generated sums withheld in the expectation of a certain tax liability, which are then returned to the taxpayer if the actual tax liability is less than anticipated. Such sums must be classified as "net income" because they are "income . . . earned . . . through the receipt of wages, salary, [and] commissions . . ." and are not subject to any of the permissible "disregards" of income. (45 C.F.R. § 233.20 (a)(11)(i).)

This conclusion is bolstered by an examination of the statutory treatment of tax refunds and credits in related portions of the federal codes. For example, sections 43 and 3507 of title 26 of the United States Code provide that specified low-income individuals may be permitted

"earned income credits," which are tax credits against income taxes which are otherwise imposed. The credits are in an amount equal to 10 percent of earned income not in excess of $5,000. Under 26 United States Code section 3507, an employer is required to pay an employee an additional sum if the employee has filed an eligibility certificate for an earned income credit. For tax purposes, these payments are not treated as additional compensation and their source is sums which normally would be withheld by the employer as payroll deductions for taxes and FICA. Thus, depending on whether or not the employee has filed a certificate with his or her employer, earned income credits will be received as an additional amount in the employee's paycheck, or when income taxes are due and a refund is made.

In 1980, Congress mandated that "*any refund of Federal income taxes* made by reason of section 43 . . . [or] 3507 of Title 26 . . . shall be considered earned income" to be taken into consideration in determining need. (Italics added, former 42 U.S.C. § 602(d).) As amended in OBRA, the statute now provides that "an individual's 'income' shall also include . . . an amount (which shall be treated as earned income for purposes of this part)" which is equal to the earned income credit advance to which he or she would be entitled, whether or not a certificate has actually been filed with the employer. (42 U.S.C. § 602(d)(1); 45 C.F.R., supra, § 233.20(a)(6)(ix).) The apparent reason for this change was to encourage "an increased number of AFDC recipients [to] file for an advanced [earned income credit]." (Dept. of Health and Human Services, Social Security Administration, Coms. to Final Regs., 47 Fed. Reg. 5648, 5660 (Feb. 5, 1982).)

The effect of the foregoing is that Congress has considered earned income credits as refunds or credits of otherwise due taxes which *must be counted as income for purposes of AFDC.* Although careful to avoid double counting of such sums when they are deemed received in a paycheck and when they are actually received in a lump sum (47 Fed. Reg., supra, at pp 5660-5661), the clear Congressional intention is that such refunds of taxes are not to be ignored in determining eligibility or the amount of assistance to which AFDC recipients are entitled.

Congressional treatment of income tax refunds afforded under the Food Stamp Program is also illuminating. Section 2014(d) of title 7 of the United States Code in determining food stamp eligibility specifically excludes from income "moneys received in the form of nonrecurring lump-sum payments, *including,* but not limited to, *income tax refunds . . .*" (Italics added.) In the food stamp sector, Congress expressly eliminated income tax refunds from the definition of income. It has not similarly excluded such sums in the area of AFDC benefits. I think that therein lies a revealing lesson—Congress clearly could have provided analogous treatment had it so intended. It did not do so.

My colleagues rely on King v. Smith (1968) 392 U.S. 309 and Lewis v. Martin (1970) 397 U.S. 552 (see *ante,* p. — [maj. opn., at pp. 13-14]). However, these cases are of dubious analytical value, for each involved the invalidation of regulations which improperly *assumed* the availability to the recipient of income. In our case, the moneys are in the hands of the recipients; availability is simply not in issue.

In my view, the Internal Revenue Service (IRS) will be surprised to learn that tax refunds are "forced" savings accounts as described by the majority. (*Ante,* p. — [maj. opn., at p. 18].) Such refunds have few of the attributes of a "savings account." They may not be withdrawn at will and do not accrue interest. The IRS requires that refunds of state taxes be reported as *income* in the year of receipt, further demonstrating that such funds bear little resemblance to money placed in a savings account. More importantly, however, under the majority's analysis, the DSS is not permitted to count amounts withheld as "earned income" either when they are deducted or when they are refunded. The effect of this reasoning is that such funds will escape entirely the requirement that income be considered in determining eligibility and the amount of assistance to which a recipient is entitled, all of which is contrary to the clear mandate of 42 United States Code section 602(a)(8) cited above.

Nor does the majority's reliance on *Carleson,* supra, 5 Cal.3d 730, survive scrutiny. We held there that "the [applicable] HEW [Department of Health, Education and Welfare] regulation . . . *permits* the state to consider as income only those funds received 'on a regular basis.' Consequently, California's distinction between recurring and nonrecurring payments comports fully with the federal requirements." (Italics added, *id.* at p. 749.) As the majority notes, "the *Carleson* court needed only to find that the regulation was consistent with federal law." (*Ante,* p. — [maj. opn., at p. 20].) From this premise, that the approach adopted in California was consistent with the governing federal statutory and regulatory scheme, the majority now argues that the DSS, when it

changed its policy after our decision in *Carleson*, was required to show that "its abrupt reversal of policy in the wake of explicit judicial approval executed an expressed legislative intent and resulted in a policy consistent with federal law." (*Ante*, p. —, italics added, fn. omitted [maj. opn., at p. 20].) Thus, the majority has transformed a requirement of consistency to a requirement that the department show, in addition, "an expressed legislative intent" before it may adopt a new approach and new regulations. The practical effect of this holding is to restrict an agency to its initial approach, despite the fact that its choice was one among several acceptable methods of implementing a statutory scheme, unless the Legislature expressly approves an alternative approach.

My colleagues' reliance on Cooper v. Swoap (1974) 11 Cal.3d 856, and California Welfare Rights Organization v. Carleson (1971) 4 Cal.3d 445, in support of this novel requirement is misplaced. In each of those cases, we held that state regulations were *in conflict* with the statutory provisions which they were designed to implement, not that the regulations failed for lack of a newly expressed legislative intent approving a shift from one consistent approach to another equally consistent approach. Thus, in *Cooper*, we found that new regulations regarding treatment of noncash benefits as income were inconsistent with express legislative history, incompatible with the general "flat grant" approach utilized under the state plan, and *explicitly precluded* by applicable statutory provisions. Similarly, in *California Welfare Rights Organization* we found that new state regulations imposed following a federal court ruling that the state scheme did not comport with federal requirements were in part invalid because

the regulations were neither necessary for conformity with federal requirements *nor authorized by statute.*

The majority somehow transforms these holdings that the regulations at issue were *incompatible* with federal or state law into a new requirement that a new regulation follow only after a new expression of legislative intent. There is no such requirement in law, statutory or decisional, so far as I am aware. *Any* regulation which comports with the existing underlying legislative scheme is permissible; no additional legislative approval is needed. Such regulation should clearly be afforded the great weight which we normally give to the interpretations of a statute by the administrative agency which is empowered to promulgate applicable regulations. (See, e.g., Judson Steel Corp. v. Workers Comp. Appeals Bd. (1978) 22 Cal.3d 658, 668.)

Nor does the majority point to an actual incompatability here. Instead, it ignores fundamental rules of statutory construction in attempting to reconcile its conclusion with the governing state and statutory schemes. I note only a few instances of the convoluted paths of reason which my colleagues are thereby forced to tread. First, and most obviously, as noted my colleagues fail to give any effect to the federal regulation action in response to the passage of OBRA in specifically deleting the requirement of regularity. This alteration took place after several courts had expressly relied on that requirement in concluding that income tax refunds were not to be counted as income. Despite this excision, the majority continues to "intuit" a federal intention to require regularity.

The United States Senate Report regarding the altered treatment of lump sums in OBRA is also instructive.

The majority cites language in the report which gives as an example of a lump sum payment retroactive social security benefits. (*Ante*, p. — [maj. opn., at p. 23].) From this, it concludes that only money "ordinarily" received on a regular and recurring basis will comprise the lump sum of which Congress speaks. However, the report expressly states that "The committee believes that *lump-sum payment should be considered available* to meet the ongoing needs of an AFDC family . . . *any amount of the income* that exceeds the initial month's needs standards would be divided by the monthly needs standard, and the family would be ineligible for aid for the number of months resulting from that calculation." (Sen. Rep. No. 97-139, reprinted in 1981 Code Cong. & Admin. News at p. 771, italics added.) Instead of relying on the express and unqualified statement of intent regarding the treatment of "lump sum payments," the majority seizes upon a reference to one possible source of such funds and there discerns an unspoken legislative intent.

Similarly, the majority's reliance on the State Department of Social Services, Eligibility and Assistance Standards Manual, section 44-111.44 is misplaced. The section expressly excludes certain irregularly received income from consideration as income for purposes of computing AFDC, indicating that "but for" the stated exemptions, such irregular income must be considered. (See *ante,* p. —, fn. 8 [maj. opn., at p. 24].) Ignoring the application of the basic rule of statutory interpretation, inclusio unius est exclusio alterius, the majority instead reads in an exception for the unmentioned tax refunds.

In summary, in order to find a conflict, the majority must reject a straightforward reading of the applicable

statutes and instead intuitively glean congressional and administrative intent from selected portions of the applicable statutes and regulations. The conflict is, I submit, a manufactured one.

Justice Potter Stewart wisely cautioned 14 years ago: "Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration [citation] . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [Citations.]" (Dandridge v .Williams (1970) 397 U.S. 471, 487.) In similar fashion, our role is not to articulate policy, but to determine whether the challenged state regulations are permitted by federal law.

The injunction from which the Director appeals may well have been proper when issued. Inasmuch as an injunction operates in futuro, however, its validity on appeal must be determined as of the date of the appellate decision. (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1979) 25 Cal.3d 317, 323.) The OBRA and amendment to 45 C.F.R. § 233.90(a)(1) have intervened. I would, therefore, reverse the injunction and deny the petition for writ of mandate.

RICHARDSON, J.

WE CONCUR:

KAUS, J.
GRODIN, J.

APPENDIX B

No. 000563

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COURT OF LOS ANGELES

JANET VAESSEN, KATHLEEN SENTIO, PAGET FUTRELL, JIMMY JONES, SHARON DELGADO, and WELFARE RECIPIENTS LEAGUE,

Plaintiffs-Petitioners,

vs.

MARION J. WOODS, as Director of the Department of Social Services; DEPARTMENT OF SOCIAL SERVICES, an agency of the State of California; STATE OF CALIFORNIA, a political entity,

Defendants-Respondents.

ALICIA HOWARD, ELOISE DORSEY and CAROL ESQUIBEL,

Plaintiffs-Petitioners In Intervention.

CLASS ACTION

PRELIMINARY INJUNCTION

(Filed April 18, 1980)

The above matter came on regularly for hearing on April 18, 1980, pursuant to a duly noticed motion for a preliminary injunction. Marilyn Katz appeared as counsel for Plaintiffs, and G. R. Overton appeared as counsel for Defendants.

On proof being made to the satisfaction of the Court, and good cause appearing therefore:

IT IS HEREBY ORDERED that during the pendency of this action, or until the final determination thereof,

or until the Court shall otherwise order, the Defendants, their successors in office, agents, assigns, employees, and all persons acting in concert with them or subject to their control and supervision, shall be, and hereby are, enjoined and restrained from reducing or denying AFDC benefits of all California recipients of or applicants for Aid to Families with Dependent Children (AFDC) whose benefits otherwise would have been reduced or denied because of Defendant's policy of refusing to treat tax refunds arising from the 1979 tax year as property resources instead of as income.

This order is effective immediately. Therefore, defendant is prohibited from failing to provide full benefits to those AFDC applicants during the month of April whose applications were denied or whose applications were granted but whose benefits were reduced due to Defendant's policy of treating tax refunds as income. Defendant is also prohibited from failing to provide recipients whose grants were reduced in April due to the operation of the above policy their full benefits.

IT IS HEREBY ORDERED that Defendants shall comply fully with this Order within a reasonable time.

Bond is waived.

Dated: April 18, 1980

JERRY PACHT
JUDGE OF THE SUPERIOR COURT

APPENDIX C

2 Civ. No. 62386
Super. Ct. No. CA000563

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JANET VAESSEN; KATHLEEN SENTIO; PAGET FUTRELL; JIMMY JONES; SHARON DELGADO; and WELFARE RECIPIENTS LEAGUE,

Petitioners and Respondents,

v.

MARION J. WOODS, as Director of the Department of Social Services; DEPARTMENT OF SOCIAL SERVICES, an agency of the State of California, STATE OF CALIFORNIA, a political entity,

Defendants and Appellants.

(Filed May 20, 1982)

APPEAL from an order of the Superior Court of Los Angeles County. Jerry Pacht, Judge. Reversed.

George Deukmejian, Attorney General. Thomas E. Warriner, Assistant Attorney General, Anne S. Pressman and G. R. Overton, Deputy Attorneys General, for Defendants and Appellants.

Western Center On Law & Poverty, Inc., Alan Rader and Marilyn Katz; and Community Legal Services, Eileen Matteucci and Stanley E. Doty, for Petitioners and Respondents.

Class action by welfare recipients receiving assistance under a state plan for aid and services to needy fam-

ilies with children (AFDC program) against the Department of Social Services for the State of California and its Director, Marion J. Woods. At issue is the propriety of the state's practice to consider income tax refunds received by AFDC recipients as a form of regular income and to reduce the financial aid by the amount of the refund. The trial court granted a preliminary injunction compelling defendants to treat income tax refunds as "resources", not "income", and requiring defendants to make retroactive payments to those AFDC recipients who were denied aid or whose aid was reduced because the income tax refund was treated as income. The State appeals. We reverse.

DISCUSSION:

The Social Security Act makes federal funds available to those states which choose to participate in providing aid and services to needy families with children. (42 U.S.C. § 601.) Once a state elects to join the program, its plan must comply with the mandatory requirements of the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health and Human Services (HHS), formerly known as the Department of Health, Education and Welfare (HUD). *(County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 739; *California Welfare Rights Organization v. Carleson* (1971) 4 Cal. 3d 445, 448-449.)

To encourage recipients of public assistance to become self-supporting and productive members of the community, it is the policy of this state, to the extent it is consistent with federal law, to allow them to earn some money without a proportionate deduction in their aid grants.

(Welf. & Inst. Code, § 11008.) In addition, California allows an AFDC recipient to retain certain real property not to exceed $5,000 (Welf. & Inst. Code, § 11255) and personal property not to exceed $600 (Welf. & Inst. Code, § 11257).

The federal statute pertinent here is 42 U.S.C. section 602, subdivision (a) (7), which provides: "(a) A State plan for aid and services to needy families with children must . . . (7) . . . provide that State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." For many years, HHS has characterized an asset as income if received "on a regular basis." Thus, 45 C.F.R. section 233.90, subdivision (a) (1) states: "In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered. . . ." The State argues that the tax refund of an AFDC recipient constitutes "regular" income and therefore may be used to decrease the monthly grant by the amount of the refund. We agree.

There is no definition of the term "regular basis", in the federal statutes and regulations. While no California case law exists on the precise issue now before us,[1] the

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[1]While in *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 749 there is language raising the question whether tax refunds should be treated as deferred income, the court focused its discussion on the propriety of the California scheme which distinguished between non-recurring lump sum payments and payments recurring over a period of two or more months.

issue has been presented to a number of courts in our sister states and in the federal courts, and a split of authority has developed.

In *Kaisa v. Chang,* 396 F.Supp. 375, 377, fn. 13 (D. Hawaii 1975) the United States District Court said that an income tax refund was not available on a "regular" basis because of the uncertainty of receiving any tax refund "and the fact that even if received, it can be expected, at most, once annually. . . ." Thus, the *Kaisa* court concluded, tax refunds were not "income" for the purpose of determining eligibility and need under the AFDC program. *Kaisa* relied on *County of Alameda,* referred to in footnote 1 below. *Kaisa* was followed in *Anderson v. Morris* (1976) 87 Wash.2d 706 [558 P.2d 155].

Contrary conclusions were reached by the Oregon Court of Appeal in *Walker v. Juras* (1974) 16 Or.App. 295 [518 P.2d 663] and by the Minnesota Supreme Court in *Steere v. State, Dept. of Public Welfare* (1976) 243 N. W.2d 112. Both *Walker* and *Steere* held that tax refunds were a reasonably predictable annual source of income and therefore fell within the "regularity" requirement of the federal statute.

Plaintiffs, however, argue that because the refunds are paid only annually, they are not income received on a "regular" basis and therefore the state may not use those refunds to reduce the amount of aid received.

Under California law, certain lump sum payments received by an AFDC recipient are protected. Thus, Welfare and Institutions Code section 11157 provides: "Notwithstanding Section 11008,[2] all lump sum income received

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[2]See p. 3, *ante* [this slip opinion] — Cal.App.3d — (— Cal. Rptr. —).

by an applicant or recipient, including an applicant for or recipient of aid to families with dependent children, shall be regarded as income in the month received except *non-recurring lump sum social insurance payments,* which social insurance payments shall include but are not limited to social security income, railroad retirement benefits, veteran's benefits, workman's compensation, and disability insurance." (Emphasis added.) The term "insurance" implies the payment of money upon the happening of some event over which the individual has no control. (See *Walker v. Juras, supra,* 518 P.2d 663, 664.) Such payments generally are not the result of the recipient's efforts. On the other hand, lump sum payments in the form of income tax refunds are simply earned income which was deferred in anticipation of tax liability. *(Richards v. Lavine* (1974) 78 Misc. 2d 801 [357 N.Y.S.2d 982, 986].) Thus, tax refunds are attributable to the efforts of the recipient. Also, depending on the type of employment, amount of salary, marital status and the number of dependents claimed, a wage earner to some degree controls the amount paid in cash in the scheduled pay period and the amount paid at the end of the tax period. Tax refunds are therefore distinguishable from lump sum "social insurance payments."

Insofar as mandatory tax deductions are taken out regularly from regularly received income, return thereof to the wage earner in a lump sum payment once a year must likewise be deemed income received on a "regular" basis. As the court noted in *Steere v. State, Dept. of Public Welfare, supra,* 243 N.W.2d 112, 117, most AFDC recipients may be described as wage earners with low incomes and relatively stable economic circumstances, so

for them tax refunds are a sufficiently uniform source of income to be deemed available on a "regular" basis.

In determining plaintiffs' eligibility for AFDC benefits, the state considered only net income during the periods of employment. (California Manual of Eligibility Assistance Standards (EAS) § 44-113.241.) Thus all taxes withheld were not taken into account, which of course reduced plaintiffs' net income. A holding that a refund of these amounts withheld should have no effect on the amount of aid being received would create an anomalous result. The withholding tax would, in effect, be deducted twice: first upon determination of eligibility for aid during the periods of employment, and again upon exclusion of the tax refund. *(Walker v. Jura, supra,* 518 P.2d 663, 665, fn. 2.) If the state had determined eligibility based on gross income, instead of net income as was done here, it might well be that many of the recipients would have been ineligible for assistance because their income would have been above the qualifying level. We see no reason why the state, not having considered the amounts of taxes withheld at the time eligibility was determined, may not treat the recipient's tax refund as income and reduce the AFDC grant in direct proportion thereto.

Also, if tax refunds could not be used to reduce a recipient's AFDC grant, those refunds in effect become a protected savings account for AFDC recipients. Less money would then be available within the AFDC program, thus seriously threatening the laudable goals of the program. It also would place an even heavier burden on the taxpaying public at large, whose monies are used to fund public assistance programs.

Support for the correctness of California's treatment of income tax refund is not limited to the choice of following the cited authorities which discuss the issue in terms of regular or nonregular income. Another simple and perhaps more fundamentally sound reason which supports the result we reach here is that California's treatment of the funds in issue is fair and balancing. It is not prohibited by the federal law. Within the limits of the federal statute which established the program and provides for the distribution of the federal funds, California is free to establish and define the criteria for administration of the AFDC program and the entitlement to the AFDC funds within the state. The federal law does not prohibit the state from arranging the criteria for entitlement in such a way that the amount of income tax withheld, which when deducted from income helps to create entitlement to AFDC assistance, may be returned to the net-income side of the ledger when repaid to the recipient. There is no federal or state constitutional or statutory right to demand that this particular portion of income cannot be considered when received merely because its receipt has been deferred. It is unlike other described forms of deferred income which specifically have been permitted to be permanently disregarded—for example, the return of that portion of income used to pay social security tax when social security payments are received.

The trial court's order granting the preliminary injunction is reversed, and the case is remanded for further proceedings consistent with this opinion.

CERTIFIED FOR PUBLICATION.

/s/ BEACH, J.

We concur:

/s/ ROTH, P.J.
/s/ COMPTON, J.

(2)

No. 83-2125

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LINDA S. McMAHON, as Director of the Department of Social Services of the State of California,

Petitioner,

v.

JANET VAESSEN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

The issue raised by the petition for writ of certiorari is not whether tax refunds should be counted in calculating AFDC benefits. Refunds must be considered. The issue is whether the state court below correctly decided that in California a refund should be treated as a "resource" and calculated in one manner, instead of as "income", which would require different calculations.[1/]

Petitioner has failed to show that this is an important federal issue which this Court needs to resolve. As will be discussed, there are no conflicts between the circuit courts of appeal on the issue, and the only state supreme court decision that conflicts

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1/ If a refund is treated as a resource, it is counted against the limit on resources a state may set for AFDC families. 42 U.S.C. § 602(a)(7)(B). If a family's resources exceed the maximum amount permitted, the family is ineligible for assistance altogether. Id.

If a refund is treated as income, in effect the refund is subtracted from an AFDC family's monthly grant two months after it is received. Pet. 3a, 9a.

with the decision below construed regulations different from those at issue here. Neither Congress nor the Department of Health and Human Services (HHS) has ever required that income tax refunds to AFDC recipients be treated as income, even though several states have treated them as resources for years. The absence of federal legislative or executive interest in the issue belies any claim that an "important question of federal law" is involved in this case. See United States Supreme Court Rule 17(c).

As will also be shown, petitioner's argument that this case should be held pending disposition of Heckler v. Turner, No. 83-1097, cert. granted, February 27, 1984, misconstrues the relationship between Turner and this case. The argument of the AFDC recipients in Turner, that mandatory payroll deductions should not be counted as income actually available to working recipients at the time the money is withheld from their paychecks, is not

inconsistent with the decision below. However _Turner_ is decided, money withheld from paychecks _will_ be counted as available to recipients when later received as income tax refunds. The only question in this case is whether the money will be counted as income or as a resource.

II. THERE ARE NO CONFLICTS IN LOWER COURT DECISIONS THAT REQUIRE THIS COURT'S RESOLUTION.

During the 45 years that Congress has required the states, in determining AFDC grants, to "take into consideration any other income and resources" (Pet. 8; 42 U.S.C. § 602(a)(7)(A)), no federal circuit court of appeals has decided the question in this case. Only two other state supreme courts have decided the issue, reaching opposite results. _Anderson v. Morris_, 87 Wash.2d 706, 558 P.2d 155 (1976), holding that tax refunds must be treated as a resource; _Steere v. State Dept. of Public Welfare_, 308 Minn. 390, 243 N.W.2d

112 (1976), ruling that refunds may be treated as income to AFDC recipients.[2/] No court outside of California, since 1976, has held that under the federal AFDC statutes

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[2/] In addition, a handful of lower courts have discussed the appropriate treatment of tax refunds to AFDC recipients. Only two of those courts addressed whether refunds should be treated as income or resources under federal law, again with opposite results. In Hawaii, the district court held that refunds are resources. Kaisa v. Chang, 396 F.Supp. 375 (D. Hawaii 1975). In Oregon, an appellate court ruled that refunds may be treated as income. Walker v. Juras, 16 Ore. App. 295, 518 P.2d 663 (1974); but see Schroeder v. Hegstrom, No. 84-289-PA, ___ F.Supp. ___ (D. Ore. 1984) (available on Lexis), holding that Oregon may not count the same funds as available income both when earned in one year and when refunded in a later year. See also Curry v. Blum, 73 App. Div.2d 965, 424 N.Y.S.2d 450 (N.Y. 1980), treating tax refunds as income for AFDC recipients without considering whether they might be resources instead under federal law; Department of Public Welfare v. Ivy, 18 Pa. Comwlth. 348, 336 A.2d 435 (1975) (same).

More recently, three federal district courts have stated that as long as money is treated as income when withheld as payroll deductions from an AFDC recipient's paycheck, it may not later be treated as income when received as a refund. Schroeder, supra, Opinion and Order at 8-9; Williamson v. Gibbs, 562 F.Supp. 687, 688-90 (W.D. Wash. 1983); Dickenson v. Petit, 536 F.Supp. 110, 1120, n.22 (D. Me. 1982) (dictum), aff'd, 692 F.2d 177 (1st Cir. 1984). See Section IV infra.

income tax refunds should be treated as income rather than as resources. Moreover, as petitioner points out, the earlier opinions--those holding that refunds may be treated as income as well as those ruling that refunds are resources--construed a federal regulatory scheme different from that faced by the court below. Pet. 8-9. Thus, petitioner has failed to show that a major conflict between the decision below and other appellate decisions on the same question of federal law requires this Court's intervention.

III. THE PETITION DOES NOT RAISE AN IMPORTANT FEDERAL ISSUE.

Petitioner also overstates the importance of the issue involved to the functioning of the AFDC program. Initially, the amounts of money involved are relatively low. Although, as petitioner points out, 60 percent of AFDC recipients work at some time during a year, fewer than five percent of AFDC recipients benefit from tax refunds. Pet. 4a. By

petitioner's own figures, the amount of money received in tax refunds amounts to approximately one one-thousandth of annual AFDC grants in California.[3/]

An even stronger indication of the lack of importance of the issue in this case to the functioning of the AFDC program is the lack of Congressional or regulatory interest in the issue. Although AFDC statutes and regulations have been amended numerous times, neither Congress nor HHS has ever seen fit to define the difference between "income" and "resources" for AFDC purposes, which would resolve the issue herein. HHS has taken a *laissez faire* attitude towards the numerous states which, through administrative regulation

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[3/] Petitioner estimated that in 1976-77 approximately 22,700 California AFDC recipients received tax refunds averaging $131 per recipient (Pet. 4a), for an estimated total of $2,973,700 per year. The combined federal and state appropriation for AFDC in California (county governments also pay a share) was more than $2.8 *billion* in 1983. California Budget Act of 1983, Stats. 1983, ch. 324, Items 5180-101-001, 5180-101-866.

or court decision, have decided to treat income tax refunds as resources rather than as income.[4] The agency has stated that certain payments, such as disability insurance payments, must be treated as income,[5] but has never taken such a position with regard

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[4] See, e.g., Colorado Dept. Soc. Serv., Staff Manual Vol. 3 Income Maintenance, § 3.250.31 (refunds disregarded altogether the month received and counted as resources thereafter); Idaho Operating Policies and Procedures, Standards for Determining Need, § 3131.6-.61 (AFDC recipient has the option of treating tax refund as resource or income); State of Illinois Dept. Public Aid, Categorical Assistance Manual (AFDC), § 505.6 (refunds treated as assets (resources) rather than income); Maine Public Assistance Payments Manual, Ch. II, § C, p. 11 (refunds treated as assets); Maryland Dept. Human Resources, Income Maintenance Administration, COMAR 06.03.02.05, 4 D 56 (refunds treated as resources); Minn. Dept. Public Welfare, AFDC Program Manual, IV-M-9-i (tax refunds excluded from consideration altogether); N.Y. State Dept. of Social Services, Administrative Directive, Transmittal No. 82ADM-9, March 25, 1982 (income tax refunds must be treated as resources). In addition, as discussed previously, court orders in Hawaii, Oregon and Washington forbid counting of refunds as income. See cases cited in note 2 supra.

[5] See Appendix "A" (Policy Statement by Jo Anne B. Ross, Acting Associate Commissioner for Family Assistance, U.S. Department of Health and Human Services, Social Security Administration, dated September 13, 1983).

to income tax refunds. Thus, the issue in this case, while of enormous importance to the individual respondents,[6/] has never been deemed significant by Congress or HHS, the agencies responsible for setting nationwide AFDC policy.

Petitioner argues, nonetheless, that treating refunds as resources would emasculate the "lump-sum" rule, a recently enacted amendment to the Social Security Act which specifies that when certain AFDC recipients receive "an amount of income" in a large lump sum, the income will be considered available not only in the month received but in future months as

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[6/] As recounted by the court below, when refunds were treated as income in California, an AFDC recipient who received an income tax refund and spent that refund to repay existing debts would find her grant reduced by the amount of that income two months later. In many cases, this caused extreme hardships and disruptions of family life. Pet. 3a-4a.

well. 42 U.S.C. § 602(a)(17).[7/] Notwithstanding that the plain language of the lump sum rule applies only to "amounts of income" and does not specify when an amount must be considered income, petitioner argues:

> It must be conceded that the purpose of the "lump-sum" rule is to make sure that the receipt of a "lump-sum" payment is treated as "income" in the month of receipt and budgeted for use in ensuing months. (Pet. 9-10.)

In fact, however, HHS, the agency charged with implementing the lump sum rule, recently has stated that

> States have been permitted their choice of treating non-recurring or "windfall" lump sum payments as income or resources. Examples of windfall non-recurring payments are gifts, inheritances,

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[7/] The statute specifies that "such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month . . . divided by (ii) the standard of need applicable to such family. . . ." Id. § 602(a)(17)(A).

> lottery winnings, damage claim settlements, insurance death benefits, etc. (HHS Policy Statement, _supra_ (Appendix "A"), at 1-2.)

Indeed, some lump sums, such as court settlements used for the purpose paid (_e.g._, to meet the cost of a lost vehicle), may be disregarded altogether. _Id_. at 2. Thus, the determination by Congress of how lump sums of income should be treated has very little to do with the issue in this case, whether a refund is income or a resource.

In summary, neither Congress nor HHS has ever expressed interest in the issue presented in the petition, the issue does not involve a great deal of money, and the decision below does not threaten other aspects of the AFDC program. By any criterion, petitioner has failed to demonstrate the existence of an important federal issue.

IV. THERE IS NO VALID REASON TO HOLD THIS CASE PENDING DISPOSITION OF HECKLER VS. TURNER.

Petitioner argues that her petition in this case should be held pending disposition of Heckler v. Turner, supra, No. 83-1097, because a victory for the AFDC respondents in both Turner and this case would be unfair to the government. Pet. 10-13. As shown above, petitioner has failed to demonstrate an important federal question that this Court needs to resolve. In the absence of an important federal issue, this Court should not grant a petition for writ of certiorari merely to prevent indigent welfare recipients from receiving a perceived "windfall" averaging $131 per year. (Pet. 4a.)

Moreover, petitioner misconstrues the relationship between Turner and this case. While it would be inequitable for the government to prevail in both Turner and Vaessen, it does not follow that it would be inequitable for the AFDC recipients to win both cases.

The issue in Turner is whether the state may count mandatory payroll deductions as income actually available to an AFDC recipient in the month the money is withheld, and then subtract the amount from the recipient's grant. See Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983).

Petitioner concedes that it would be inequitable to "double count" the very same money as income when received later as an income tax refund, and again subtract the amount from the monthly grant. Pet. 10-13.[8/]

However, declares petitioner,

> the State just as strongly believes that to allow a portion of a person's salary to escape treatment as "income" altogether does violence to the Congressional mandate that the State "'shall, in determining need,

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[8/] The "double counting" problem was not an issue at the time of the California Supreme Court decision because of a district court opinion in Turner enjoining petitioner from considering monies withheld for income tax purposes as income available to AFDC recipients. Pet. 6a-7a.

> take into consideration any other income and resources' of the family." 42 U.S.C. § 602 (a)(7). (Pet. 11.) (Emphasis added by petitioner.)

Thus, petitioner argues, if the government loses Turner it should prevail in this case.

The very statutory passage quoted by petitioner refutes her contention. The state's mandate is not to consider all sums of money received by a recipient as income, but rather to "take into consideration any other income and resources of the family." If the AFDC families prevail in both Turner and Vaessen, income tax refunds will still be considered. They will be considered as resources and counted against the statutory limit California imposes on resources an AFDC family may accumulate. Cal. Welf. & Inst. Code §§ 11155, 11257. If receiving a refund causes a family's resources to exceed the maximum amount permitted, the family will become ineligible for assistance altogether. 42 U.S.C. § 602(a)(7)(B). In short, while

"double counting" of refunds is a legitimate concern if the government prevails in both Turner and this case, there is no possibility of "zero counting" of refunds if the AFDC families win both cases. The pendency of Turner does not provide a basis for granting a petition in this case.[9/]

[9/] If the government prevails in Turner, however, the prospect of "double counting" would constitute an independent justification for the decision below in this case, and thus another reason for denying the instant petition. Justice Rehnquist recently granted the federal government's request in Turner for a stay of the injunction in that case. Heckler v. Turner, No. A-59 (83-1097), Order, dated August 10, 1984. This means, at the very least, that until Turner is finally resolved, mandatory deductions from an AFDC recipient's paycheck will be counted as income and, in effect, subtracted from a recipient's monthly grant. Every court that has considered the issue has stated that it would be inequitable under those circumstances to count the same money again as income when received as an income tax refund. Schroeder v. Hegstrom, supra, Opinion and Order at 8-9; Williamson v. Gibbs, supra, 562 F.Supp. at 688-90; Dickenson v. Petit, supra, 536 F.Supp. at 1120, n.22. See also Pet. 6a (noting that the California Supreme Court had previously issued an order prohibiting "double counting" in this case).

See also Pet. 10: "While the State is emphatic in its belief that income tax refunds
(Continued)

V. CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for writ of certiorari to the California Supreme Court be denied.

DATED: August 20, 1984.

Respectfully submitted,

RICHARD A. ROTHSCHILD
MARILYN KAPLAN
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By ______________________
RICHARD A. ROTHSCHILD
Counsel of Record

Attorneys for Respondents

Footnote Continued:

are 'income', the State is equally as emphatic in its belief that any particular dollar of 'income' should not be 'doubled counted'."

Refer to SFB-11 FA-3-8

Office of Family Assistance
Washington, D.C. 20201

SEP 13 1983

TO: Billie A. Thompson
Regional Administrator, OFA
Region VI - Dallas

FROM: Jo Anne B. Ross
Acting Associate Commissioner
for Family Assistance

SUBJECT: Response to Regional Inquiry - Lump Sum Income Earmarked for a Specific Purpose (Your Memorandum of July 28, 1983)

This memorandum has been prepared by the Division of Legislative and Regulatory Policy in the Office of Policy and Evaluation.

Issue

What latitude do States have in defining lump sum payments as income or as resources?

Response

The general rule, as reflected in section 402(a)(7) of the Social Security Act and Federal regulation at 45 CFR 233.20(a)(3)(ii)(A), is that all income and resources, whether regularly or irregularly received or earned or unearned, of any individual applying for or receiving assistance, will be considered in determining eligibility and the amount of assistance except as otherwise required or permitted to be disregarded under the Act or other Federal law.

Under this rule, States have been permitted their choice of treating non-recurring or "windfall" lump sum payments as income or resources. Examples of windfall

non-recurring payments are gifts, inheritances, lottery winnings, damage claim settlements, insurance death benefits, etc. We are carefully reviewing whether or not to continue this policy on windfall payments.

Some payments, however, while received as a lump sum, are actually an accumulation of current income received in a single sum, are not considered windfall in nature, and must be treated as income. For example, the initial OASDI payment representing an accumulation of current monthly benefits must be counted as lump sum income and cannot be considered as a resource.

Issue

Must the lump sum provision be applied when a recipient receives compensation for loss of a resource and spends only part of the lump sum to replace the resource. Would that portion of the lump sum not spent to replace the lost resource be counted as lump sum income, thereby triggering the lump sum provision?

Response

Where a recipient is compensated for loss of a resource, i.e., an automobile, through an insurance settlement, the State has the option of treating this non-recurring lump sum payment in the nature of a windfall as either income or as a resource.

Regardless of whether a State chooses to consider the lump sum insurance settlement as income or as a resource, the State is permitted to disregard any portion of the settlement used for the purpose for which paid. For example, if the settlement is to meet the cost of loss of a vehicle, the portion used to replace the vehicle is not

required to be counted as income or as a resource in determining the amount of the AFDC payment. This is clear in the preamble to the final regulation implementing the Omnibus Budget Reconciliation Act of 1981 (OBRA) (Federal Register of February 5, 1981, pages 5656 and 5657, column 3).

Any of the money that is not spent for the purpose for which it was paid, i.e., replacement of a vehicle in your example, must then be counted as income or as a resource depending on how the State has defined insurance settlements. For example, if the State has categorized insurance settlements as income, any excess left after applying the money to vehicle replacement would trigger the lump sum rule and the provision at 45 CFR 233.20(a)(3)(ii)(D) would apply. If, on the other hand, the State has categorized insurance settlements as a resource, to the extent that the insurance money is not used to replace the vehicle, the purpose for which it was paid, it must be measured against the State's established resource limit to determine continued eligibility as provided for at 45 CFR 233.20(a)(3)(i)(B). If categorized by the State as a resource, such money does not convert to income, and trigger the lump sum rule.

If you have further questions, you may contact Joyce Fernandez on 245-3125.

cc: Regional Administrators, OFA